Sime Bank Bhd v Projek Kota Langkawi Sdn Bhd

HIGH COURT (ALOR SETAR) — ORIGINATING SUMMONS NO 24–978 OF 1997
MOHD HISHAMUDIN J
21 JUNE 1998

Land Law *— Malay reservations — Charge in favour of non-Malay — Whether Malay reservation land can be charged to a non-Malay — Validity of charge — Person eligible to attest the execution of charge instrument — National Land Code 1965 ss 206(1), 211(1), Fifth Schedule paras 1(1), 3(2) & 4(1)*

Words and Phrases *— 'Malay' — Malay Reservation Enactment (Kedah Enactment No 63) s 2*

The defendant, the registered owner of a Malay reservation land ('the land'), had charged the land to the plaintiff bank. The charge instrument was attested by an advocate and solicitor. Upon default by the defendant, the plaintiff applied for the sale of the land under s 256 of the National Land Code 1965 ('the NLC'). The issues before the court were whether: (i) a Malay reservation land can be charged to a person who, by definition under the Malay Reservation Enactment of the State of Kedah ('the Enactment'), is not a Malay; and (ii) it is a requirement under the NLC that the attestation of the execution of the charge instrument by the chargee should have been by a land administrator.

Held, allowing the plaintiff's application:

(1) The plaintiff, although being a company and therefore not a Malay as defined by the Enactment, is allowed to be a chargee in respect of a Malay reservation land (see pp 340I and 341A); *RAP Nathan v Haji Abdul Rahman* [1980] 1 MLJ 248 followed; *T Bariam Singh v Pegawai Pentadbir Pesaka Malaysia (Administrator of Estate of Datuk Foo Say Lee)* [1983] 1 MLJ 232 and *Ho Giok Chay v Nik Aishah* [1961] MLJ 23 distinguished.

(2) Under para 1 of the Fifth Schedule of the NLC, the execution of the charge instrument by the attorney of the chargee, on behalf of the chargee, may be attested by an advocate and solicitor (see p 341A–B).

[Bahasa Malaysia summary

Defendan, pemilik berdaftar tanah perizaban Melayu ('tanah tersebut'), telah menggadaikan tanah tersebut kepada bank iaitu plaintif. Instrumen gadaian telah diakusaksi oleh seorang peguambela dan peguamcara. Atas keingkaran defendan, plaintif telah memohon untuk jualan tanah tersebut di bawah s 256 Kanun Tanah Negara 1965 ('KTN'). Isu-isu di hadapan mahkamah adalah sama ada: (i) tanah perizaban Melayu boleh digadaikan kepada seorang yang

A tidak ditakrifkan sebagai orang Melayu di bawah Enakmen Perizaban Melayu Negeri Kedah ('Enakmen tersebut'); dan (ii) ia merupakan suatu keperluan di bawah KTN bahawa pengakusaksian pelaksanaan instrumen gadaian oleh penerima gadaian sepatutnya dilakukan oleh seorang pentadbir tanah.

B **Diputuskan,** membenarkan permohonan plaintif:

(1) Plaintif, walaupun sebuah syarikat dan dengan itu bukanlah seorang Melayu seperti yang ditakrifkan oleh Enakmen tersebut, dibenarkan menjadi pemegang gadaian berkenaan dengan tanah perizaban Melayu (lihat ms 340I dan 341A); *RAP Nathan v Haji* C *Abdul Rahman* [1980] 1 MLJ 248 diikut; *T Bariam Singh v Pegawai Pentadbir Pesaka Malaysia (Administrator of Estate of Datuk Foo Say Lee)* [1983] 1 MLJ 232 dan *Ho Giok Chay v Nik Aishah* [1961] MLJ 23 dibeza.

(2) Di bawah perenggan 1 Jadual Kelima KTN, pelaksanaan D instrumen gadaian oleh wakil pemegang gadaian, bagi pihak pemegang gadaian, boleh diakusaksi oleh seorang peguambela dan peguamcara (lihat ms 341A–B).]

Cases referred to

E *Ho Giok Chay v Nik Aishah* [1961] MLJ 23 (distd)
RAP Nathan v Haji Abdul Rahman [1980] 1 MLJ 248 (folld)
T Bariam Singh v Pegawai Pentadbir Pesaka Malaysia (Administrator of Estate of Datuk Foo Say Lee) [1983] 1 MLJ 232 (distd)

Legislation referred to

F Malay Reservation Enactment (Kedah Enactment No 63) ss 2, 6(1), (2), 8(1), 19
Malay Reservation Enactment 1930 (Kelantan) s 7(i), 12(i)
National Land Code 1965 ss 206(1), 21(1), 256, Fifth Schedule paras 1(1), 3(2), 4 (1)
G Rules of the High Court 1980 O 83

Varghese George (*Zain & Co*) for the plaintiff.
Balvinder Singh (*Sri Ram & Co*) for the defendant.

Mohd Hishamudin J: This is an application by the plaintiff bank for the sale of the defendant's land under s 256 of the National Land Code 1965 H read with O 83 of the Rules of the High Court 1980. The defendant, a company, had charged the said land to the plaintiff as a security for an overdraft facility but subsequently defaulted in the repayment of the sum borrowed. Hence, the plaintiff commenced foreclosure proceedings.

At the commencement of the hearing of this originating summons, I both sides informed the court that their submissions would be confined only to two main issues.

The first issue is whether, in the light of s 6 of the Malay Reservation Enactment of the State of Kedah (Enactment No 63), a Malay reservation

land can be charged to a person who, by definition under the Enactment, is not a 'Malay'. A

Section 6 provides:

> (1) Save as hereinafter provided in this Enactment, where any Reservation land is held under a document of title by a Malay, no right or interest therein shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise, in any person who is not Malay ... . B
>
> (2) Any document or agreement purporting to vest in any person any right or interest contrary to the provisions of sub-section (1) shall be void.

Both parties concede that the land in question is a Malay reservation land. C It is also agreed that the plaintiff bank, Sime Bank Bhd (the chargee), is not a 'Malay' for the purpose of the Enactment.

'Malay' is defined in s 2 of the Enactment as:

> ... a person professing the Muslim religion and habitually speaking the Malay language of whose parents one at least is a person of Malayan race or D of Arab descent.

Encik Varghese George, learned counsel for the plaintiff, submits that the Enactment permits the charging of an alienated Malay reservation land to a person, who, by definition, is not a 'Malay'. He submits that the word '... otherwise,' in the phrase '... sale at the instance of a chargee or E otherwise ...' in sub-s (1) of the Enactment does not include the vesting of a right or interest by way of a charge under the National Land Code. He argues that the word should not be given such a wide interpretation, as proposed by learned counsel for the defendant, so as to mean the vesting of a right or interest by any means whatsoever. He urges the court to apply the ejusdem generis ('of the same kind') rule and hence to confine the F meaning of 'otherwise' only to any vesting involving an absolute transfer of rights and interests over the land, such as, eg the granting of an irrevocable power of attorney, in respect of the land, by the Malay landowner to a non-Malay.

Encik Varghese further argues, in the alternative, that even if the court G were to reject his argument regarding the application of the ejusdem generis rule, and were to give a wide interpretation to the word 'otherwise', s 6 would still not apply to a charge under the National Land Code 1965. He contends that the words 'Save as hereinafter provided in this Enactment ...' appearing at the beginning of sub-s (1) of s 6, when read H together with the third para of Schedule A of the Enactment, in particular, the words:

> All documents of title except Permits, Banchi Sewa, and Surat Akuan may be charged to anyone; but if the chargor does not pay the money due the land if owned by a Malay may be sold only to a Malay, ...

I

imply that it is permissible under the Enactment for a Malay reservation land to be charged to any person who is not a Malay. Learned counsel relies on *T Bariam Singh v Pegawai Pentadbir Pesaka Malaysia (Administrator of Estate of Datuk Foo Say Lee)* [1983] 1 MLJ 232 and *RAP Nathan v Haji Abdul Rahman* [1980] 1 MLJ 248.

According to the ejusdem generis rule, when a series of particular words in a statute is followed by general words, the general words are confined by being read as of the same scope of genus as (ejusdem generis with) the particular words. This rule is one of the many rules of interpretation that have a restrictive effect. It was developed by the courts in England at a time when the judges' attitude towards statutes has usually been restrictive. Strictly, this 'rule' is not a rule at all, in the sense that its use is obligatory; and, indeed, nowadays in interpreting modern statutes, its application is the exception rather than the rule.

With respect, I am not persuaded by learned counsel's first argument. I am not inclined to apply the ejusdem generis rule here because first, upon examining the series of particular words used in the section, that is to say, the words '... whether by transfer, sale in execution of a decree, sale at the instance of a chargee ...', the category or genus of the transactions mentioned therein is not easily ascertained or defined. Second, even if the court were to be able to define the genus (however, I do not propose to attempt to do so), it is significant to note that, of all the general words that could be used in the section, the legislature had chose to use the word '... otherwise'. Now, according to *The Concise Oxford Dictionary*, the word 'otherwise' means 'in a different way'. The choice of word here, to my mind, strongly indicates that the legislature intends the prohibition to be as wide as possible so as to include *even* transactions which are *different* from those already specified (transfer, sale in execution of a decree and sale at the instance of a chargee). Third, the objective of the Enactment is to protect Malay rights by preventing reservation lands from falling into the hands of non-Malays. If a restrictive interpretation were to be given to the word 'otherwise', such an approach would defeat the purpose of the Act.

However, I am with learned counsel on the alternative argument advanced by him. But at the outset, let me make it clear that, to my mind, the decision in *Bariam Singh* is not applicable to the facts of our case because there Zahir J was interpreting the Kelantan Malay Reservation Enactment 1930. It is true that the learned judge, at p 237 of the judgment, did say as follows:

> In Kedah, it has been the practice that reservation lands are chargeable to non-Malays and no court has ever held it to be null and void and no one has ever, in my recollection, challenged this in court. However, as provided by the Enactment, all purchasers of sale of reservation lands are limited to Malays only. It is interesting to note that if we accept Hepworth J's decision [in *Ho Giok Chay v Nik Aishah* [1961] MLJ 23] is correct, that a charge is an interest in land and therefore void, then applying the principle of this decision it should also be applicable to charges in Kedah as the Kedah Enactment also contained the wordings: 'no right or interest therein shall vest'. Properly speaking, therefore, no charges to non-Malays should be registered in Kedah.

But this reference to the Kedah Enactment is only as a general passing remark or observation. However, the judgment in *RAP Nathan* lends support to the alternative argument. For Syed Agil Barakbah J (as he then

was), in interpreting the Kedah Enactment, said by way of obiter dicta (at p 251): A

> In the second paragraph of the Schedule, it is stated that all documents of title except Permits, Banchi Sewa and Surat Akuan may be charged to anyone. If the chargor does not pay the money due, the land so charged if owned by a Malay can be sold only to a Malay or a Siamese. In short, subject to what is stated above as regards to sale, the [Kedah] Enactment allows reservation land to be charged to a non-Malay. B

I concur with this view.

Encik Balvinder Singh, learned counsel for the defendant, on the other hand submits that s 6 of the Enactment prohibits the charging of a reservation land to a non-Malay. In support of his contention, he cites *Ho Giok Chay v Nik Aishah* [1961] MLJ 23. In this case, Hepworth J in his judgment opined (p 53): C

> In my opinion, therefore, the charges with which we are concerned constitute a breach of the provisions of sub-s (i) of s 7 of the [State of Kelantan] Reservation Enactment. That being so, by virtue of the provisions of sub-s (i) of s 12 of that Enactment, these charges are null and void. D

Now, I accept as being relevant and applicable to our case, a passage in the earlier part of the judgment of Hepworth J in the case cited (at pp 52–53), where he ruled that a charge under the Kelantan Land Enactment transfers or vests a right or interest in the land to the chargee. Yet, in my view, E notwithstanding the above-quoted opinion of the learned judge, the decision taken as a whole does not support En Balvinder's proposition that a reservation land under the Kedah Enactment cannot be charged to a non-Malay. This is so for the simple reason that the learned judge there was interpreting the provisions of the (then) State of Kelantan Reservation F Enactment whose wordings are materially different from the provisions of the Kedah Enactment. For example, in the Kelantan Enactment, s 7(i) provides:

> No right or interest of any Malay in reservation land and no right or interest in any such land acquired by virtue of s 13A by any person not being a G Malay shall be transferred to or transmitted to or vest in any person not being a Malay provided that leases of reservation land shall be valid to the extent specified in sub-ss (ii) to (v) below, save as provided in this Enactment.

I shall now move on to the remaining issue. The issue is whether it is a requirement under the National Land Code that the attestation of the execution of the charge instrument (Form 16A) by the chargee should H have been by a land administrator. In the present case, the charge instrument was not attested by a land administrator but by an advocate and solicitor. Encik Balvinder Singh submits that the charge is null and void because the execution of the charge instrument should have been attested by a land administrator. He refers to ss 206 and 211 and para 3(2) of the Fifth I Schedule of the National Land Code. Section 206(1)(a) states:

A Need for proper instrument of dealing, duly registered

(1) Subject to the following provisions of this section —

(a) every dealing under this Act shall be effected by an instrument complying with the requirements of sections 207 to 212; ... .

B Section 211 stipulates:

Attestation of instruments of dealing

(1) Every execution by a natural person of any instrument effecting any dealing under this Act shall be attested in accordance with the following provisions of this section by one of the officers or other person specified in that behalf in the Fifth Schedule.

C Paragraph 3(2) of the Fifth Schedule states:

Subject to paragraph 4, every execution by a natural person of any instrument effecting any dealing under this Act in respect of any of the following lands shall be attested by a Land Administrator —

D (2) reservation land held by a Malay under Enactment No 63 (Malay Reservations) of Kedah, ...

Paragraph 4 of the same Schedule provides:

The requirement for attestation by a Land Administrator under paragraph 3 shall not be applicable to —

E (1) Any instrument of a charge in respect of any land referred to in that paragraph executed by a person under a power of attorney on behalf of a body corporate or a company, provided that such body corporate or company is allowed to be a chargee under the appropriate Malay Reservation Enactment; ... .

F In the case now before me, the person who had executed the charge instrument on behalf of the plaintiff was one Loh Kong Fatt, who did so under a power of attorney granted by the plaintiff.

The defendant's argument on the second issue must also, with respect, be rejected. First and foremost, para 3(2) of the Fifth Schedule of the G National Land Code 1965 does not apply here because this sub-para (2) clearly refers only to:

... reservation *held* by a Malay ... (Emphasis added.)

But the evidence shows that the land in question is held, not by a Malay, as defined, but by the defendant. The defendant is the registered owner. H On examining the definition of 'Malay' in s 2 of the Kedah Enactment, it is my view that the definition only refers to *natural* persons and not to artificial legal persons such as the defendant.

Now, at this juncture I take the opportunity to state the following pertinent observation. I note from the land title which was issued in 1993 I that the defendant is the first registered owner of the land and that, immediately prior to the alienation by the State Authority, the land was a State land, which had already been declared (way back in 1933) to be a

Malay reservation land. I must, in passing, remark here that it is a mystery how, in the light of s 8 of the Kedah Enactment, this particular piece of land could ever be alienated to the defendant in the first place. This provision prohibits such alienation. It clearly states:

> (1) No State land included in a Malay Reservation shall be sold, leased or otherwise disposed of to any person who is not either:
>
> (a) a Malay; or
>
> (b) a Siamese certified by the Director in writing to be a Siamese agriculturist permanently resident in the State.

As for para 4 of the Fifth Schedule of the Code, the plaintiff has satisfied all the requirements of this provision. First, as has been pointed out, the person who executed the charge instrument had a power of attorney. Second, also as has been pointed out, the plaintiff is allowed by the Kedah Enactment to be a chargee.

Thus, the attestation by an advocate and solicitor was in order. Paragraph 1 of the Fifth Schedule of the Code clearly provides:

> Every execution by a natural person of any instrument effecting any dealing under this Act, other than an instrument in respect of any land referred to in paragraph 3, shall be attested by any of the following officers or other persons:
>
> (1) In any State to which this Act applies:
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> ...
>
> (e) an advocate and solicitor.

Encik Balvinder also argues that the above para 4 does not exempt the plaintiff from the requirement of para 3 of the Fifth Schedule (that the execution must be attested by a land administrator), as the plaintiff bank has not been declared to be deemed a 'Malay' under s 19 of the Enactment. Section 19 provides:

> Power to declare other person to be Malay
>
> The Ruler-in-Council may, in his discretion, notwithstanding anything in this Enactment contained, by order in writing declare that any person of any race or nationality be deemed to be a Malay for the purposes of this Enactment, and such person shall then be deemed to be included in the term 'Malay' wherever it shall occur in this Enactment or in any amendment or re-enactment thereof.

With respect, I disagree. This argument is based on a serious fundamental (and, perhaps, a common) misconception. The misconception is that it is possible under the said s 19 for the Ruler-in-Council to declare a company (or any artificial legal person) to be deemed a 'Malay'. In my opinion, only a *natural* person could be declared to be deemed a 'Malay', not an artificial legal person such as a company.

In conclusion, I hold that:

(a) under the State of Kedah Malay Reservation Enactment, the plaintiff, although being a company and therefore is not a Malay, as defined by

A the Enactment, is allowed to be a chargee in respect of a Malay reservation land; and

(b) under the National Land Code 1965, the execution of the charge instrument in the present case by the attorney of the chargee, on behalf of the chargee, may be attested by an advocate and solicitor.

B The plaintiff's application is, therefore, granted as prayed.

Plaintiff's application allowed.

Reported by Mohd Rizal Abidin

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